STATE OF MICHIGAN

COURT OF APPEALS

DELHI CHARTER TOWNSHIP,

Respondent-Appellant,

v

DELHI TOWNSHIP FIREFIGHTERS, INTERNATIONAL ASSOCIATION OF FIREFIGHTERS LOCAL 5359,

Charging Party-Appellee.

UNPUBLISHED
April 21, 2015

No. 320637
MERC
LC No. 00-000018

Before: OWENS, P.J., and JANSEN and MURRAY, JJ.

PER CURIAM.

Respondent Delhi Township appeals by right the decision and order of the Michigan Employment Relations Commission (MERC), denying its motion for reconsideration of the MERC order that granted charging party Local 5359's petition for bargaining unit clarification. We affirm.

Delhi Township operates a fire department comprised of 15 full-time uniformed personnel, 12 of whom are full-time firefighters represented by Local 5359, and paid-on-call volunteer firefighters, who are not represented by Local 5359. Local 5359 was certified by MERC in 2004 as the exclusive collective bargaining representative of a Delhi Township unit that includes "All Full-Time Firefighters/Paramedics/EMS" and excludes "Fire Chiefs, Fire Marshall, Part-Time Employees, and Volunteers."

Around July 2011, Delhi Township received a grant from the Federal Emergency Management Agency (FEMA) to facilitate the training and recruitment of its part-time paid-on-call firefighters. A portion of the funds was allocated for the creation of a new position entitled recruitment and retention coordinator (RRC). Delhi Township selected Jeff Butcher, who was previously a full-time firefighter/paramedic and a member of Local 5359's bargaining unit, to be the new RRC. The MERC granted Local 5359's unit-clarification petition, by which it sought to add the newly created RRC position to its existing bargaining unit.

Delhi Township raises numerous issues on appeal. The determination of an appropriate bargaining unit is a question of fact. *Police Officers Ass'n of Mich v Grosse Pointe Farms*, 197 Mich App 730, 735; 496 NW2d 794 (1992). "In a case on appeal from the MERC, the MERC's factual findings are conclusive if supported by competent, material, and substantial evidence on

the whole record." *Macomb Co v AFSCME Council 25 Locals 411 & 893*, 494 Mich 65, 77; 833 NW2d 225 (2013) (quotation marks and citation omitted). "This evidentiary standard is equal to the amount of evidence that a reasonable mind would accept as sufficient to support a conclusion[, which] consists of more than a scintilla of evidence [but] may be substantially less than a preponderance." *St Clair Co Intermediate Sch Dist v St Clair Co Ed Ass'n*, 245 Mich App 498, 512; 630 NW2d 909 (2001) (quotation marks and citation omitted). We review de novo whether the MERC made an error of law in its decision, and if so, whether it is substantial and material. *Macomb Co*, 494 Mich at 77. Thus, "[l]egal rulings of an administrative agency are set aside if they are in violation of the constitution or a statute, or affected by a substantial and material error of law." *Amalgamated Transit Union, Local 1564, AFL-CIO v Southeastern Mich Transp Auth*, 437 Mich 441, 450; 473 NW2d 249 (1991).

Delhi Township first argues that Local 5359 is not an appropriate bargaining unit because there is no community of interests between the existing bargaining unit comprised of full-time firefighters/paramedics and the RRC position. We disagree.

The MERC's objective in setting a bargaining unit is to make the largest unit that "would be most compatible with the effectuation of the purposes of the law and would include in a single unit all common interests." *Police Officer's Ass'n of Mich*, 197 Mich App at 736. In particular,

> [t]he touchstone of an appropriate bargaining unit is a common interest of all its members in the terms and conditions of their employment that warrants inclusion in a single bargaining unit and the choosing of a bargaining agent. A community of interests includes, among other considerations, similarities in duties, skills, working conditions, job classifications, employee benefits, and the amount of interchange or transfer of employees. [*Id*. at 737 (citation omitted).]

When determining which employees belong in a bargaining unit, the commission is not required to find the optimum bargaining unit, but rather only a unit that is appropriate for collective bargaining based on the facts of each particular case. *City of Lansing, Bd of Water and Light*, 2001 MERC Lab Op 13. Moreover, it is the commission's policy "to avoid leaving positions unrepresented, especially isolated ones." *Charlotte Pub Sch*, 1999 MERC Lab Op 68.

MCL 423.231 *et seq*. (1969 PA 312, commonly referred to as Act 312) provides that public police officers and firefighters are subject to compulsory binding arbitration of labor disputes. Whether employees are subject to compulsory binding arbitration is also an appropriate "community of interests" factor to be considered when determining the appropriate bargaining unit. See *Police Officers Ass'n of Mich v Fraternal Order of Police, Montcalm Co Lodge No 149*, 235 Mich App 580, 587-588; 599 NW2d 504 (1999) (recognizing that "the different remedies available to Act 312 employees and non-Act 312 employees are a consideration against finding a community of interests").

We conclude that the commission's finding that the RRC position has a community of interests with the existing bargaining unit is supported by competent, material, and substantial evidence on the whole record. *Macomb Co*, 494 Mich at 77. First, the existing bargaining unit is comprised of 12 full-time firefighters. The experience qualifications for the RRC position include experience as a firefighter/paramedic in the fire service, with supervisory experience

preferred. The additional requirements involve firefighter certifications. The RRC education qualifications are similarly related to the firefighter field, as are the listed working conditions. Finally, in addition to the job duties related to the recruitment and retention of part-time, paid-on-call volunteer firefighters, the RRC is required to engage in firefighting activities as needed by the fire department. Thus, because the RRC is engaged in "fire fighting or subject to the hazards thereof[,]" MCL 423.232, this is an additional community-of-interests factor that the commission properly considered when granting the petition to accrete the RRC position into the existing bargaining unit. See *Police Officers Ass'n of Mich*, 235 Mich App at 587-588. Finally, that the RRC position involves administrative duties related to the part-time paid-on-call firefighters, which the existing bargaining unit members are not required to perform, does not preclude placement in the same bargaining unit (Local 5359)—the bargaining unit does not have to be optimal, just appropriate. 2001 MERC Lab Op 13.

We further note that the MERC did not legally err by concluding that the then-current difference in wages and hours between the RRC position and the existing bargaining unit members was not a basis to preclude the requested unit clarification. That Delhi Township created the RRC as a salary position with flexible hours does not indicate that there is no community of interest. Rather, the asserted differences in compensation and hours are mandatory bargaining subjects to be addressed by the bargaining unit's representative. See *Central Mich Univ Faculty Ass'n*, 404 Mich 268, 276-277; 273 NW2d 21 (1978) (noting that § 15 of the PERA, MCL 423.215, requires public employers and their employees to bargain collectively with respect to wages, hours, and other terms and conditions of employment).

We also conclude that the MERC did not err by rejecting Delhi Township's assertion that the RRC is exempt from placement in the existing bargaining unit because it is a management position. The public employment relations act (PERA), MCL 423.201 *et seq*., "governs the relationship between public employees and governmental agencies[.]" *Macomb Co*, 494 Mich at 77-78, and under MCL 423.213, the MERC has authority to decide the appropriate unit for collective bargaining. However, the MERC is prohibited from classifying as a supervisor anyone employed by a fire department who is "subordinate to a fire commission, fire commissioner, safety director, or other similar administrative agency or administrator[.]" MCL 423.213. It is undisputed that the RRC reports directly to the Delhi Township fire chief; thus, under MCL 423.213, the RRC cannot be classified as exempt from Local 5359 as a supervisor.

Delhi Township next argues that the MERC erred by concluding that the policy of the International Association of Firefighters (IAFF) against members working secondary employment as part-time paid-on-call firefighters is not relevant in determining whether the RRC position, which involves recruiting and working with paid-on-call firefighters, should be included in the bargaining unit, Local 5359. We conclude that the MERC's conclusion is not a substantial and material error of law. *Macomb Co*, 494 Mich at 77. Although the demands of the RRC position arguably conflict with the position of the IAFF, placement in the existing bargaining unit does not need to be optimum, but rather, only appropriate. 2001 MERC Lab Op 13. Given that the RRC also performs firefighter duties, the commission did not clearly err by granting the petition for unit clarification and accreting the position into the collective bargaining unit. We note that a classification is placed in a bargaining unit so as to "best secure to the employees their right of collective bargaining." MCL 423.9e. There is no statute or case law that requires the MERC to consider the ideology or policy positions of the bargaining unit's

representative when determining which employee classifications belong in a particular bargaining unit. Moreover, Delhi Township does not state any applicable case law in support of its position. "An appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims, nor may he give issues cursory treatment with little or no citation of supporting authority." *Houghton v Keller*, 256 Mich App 336, 339; 662 NW2d 854 (2003) (citations omitted).

Next, contrary to Delhi Township's contention, the MERC did not state that its decision in *In re Univ of Mich*, 25 Mich Pub Emp Rep 48 (2011) (Case No. R11 D-034), was controlling. Rather, the MERC concluded that the RRC's listed functions, experience, and certification qualification, as well as firefighter requirements, made placement in the existing bargaining unit the most appropriate. However, like the issue raised in *Univ of Mich*, the MERC did not err by declining to consider speculation that the RRC's inclusion in the Local 5359 bargaining unit would adversely affect how the RRC is viewed by the part-time paid-on-call firefighters. As previously stated, a classification is placed in a bargaining unit so as to "best secure to the employees their right of collective bargaining." MCL 423.9e. Speculation as to how the placement will impact matters other than securing employees' right to collective bargaining is not relevant. Thus, even if the commission had determined that the *Univ of Mich* decision was controlling, the MERC was correct that Delhi Township's speculation that placement in the existing bargaining unit would negatively affect the candidate's ability to perform the RRC job duties was not relevant to the clarification decision.

Our review of the record also does not support Delhi Township's assertion that the ALJ improperly limited testimony at the hearing. MCL 423.212 provides the MERC with"the discretion to determine whether to hold a hearing regarding a representation question, as do the administrative rules. There is no requirement that an evidentiary hearing must be conducted in every case." *Sault Ste Marie Pub Sch v Mich Ed Ass'n*, 213 Mich App 176, 182; 539 NW2d 565 (1995). The ALJ reviewed each asserted "disputed material fact," separating facts from argument, and properly limited testimony to exclude the RRC's subjective beliefs regarding the effect placement in Local 5359 would have on his ability to perform his duties. The record also does not support Delhi Township's assertion that the MERC ignored testimony when it decided to grant Local 5359's unit-clarification petition. The MERC specifically referenced Butcher's testimony in its decision and order granting the petition but found it to be irrelevant.

Finally, Delhi Township argues that because 2012 PA 349[1] does not apply to public police or fire department employees, MCL 423.210(4)(a)(*i*), the MERC should reconsider its decision and be required to review a union's constitution and by-laws to determine whether they conflict with the classification's job requirements before placing a classification in a bargaining

[1] 2012 PA 349 amended the PERA and "states that public employers—that is the government—cannot require governmental employees to join a union or pay union dues, fees, or other expenses 'as a condition of obtaining or continuing public employment.' " *Int'l Union, United Auto, Aerospace, and Agricultural Implement Workers of America v Green*, 302 Mich App 246, 249; 839 NW2d 1 (2013) (emphasis omitted), quoting MCL 423.210(3)(d).

unit.. 2012 PA 349 amended the PERA and is commonly referred to as the right-to-work act. Delhi Township provides no citation of authority in support of this argument; rather, it just asserts that review of the union's constitution and by-laws is now "critical" when determining whether a classification should be placed in a particular bargaining unit. We will not rationalize the basis for this claim nor search for authority to support Delhi Township's assertion. *Houghton*, 256 Mich App at 339 (citations omitted). Accordingly, we consider this issue abandoned. *Id*.

Affirmed.

/s/ Donald S. Owens
/s/ Kathleen Jansen
/s/ Christopher M. Murray